



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 )  
 ) MUR 7486  
45Committee, Inc. )  
 )

**STATEMENT OF REASONS OF COMMISSIONERS  
SEAN J. COOKSEY AND JAMES E. “TREY” TRAINOR, III**

The Complaint in this matter alleges that 45Committee, Inc. (“45Committee”), a 501(c)(4) nonprofit organization, violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by failing to organize, register, and report as a political committee.<sup>1</sup> In support of its claim, the Complaint points to over \$21 million in independent expenditures that the Respondent made leading up to the 2016 presidential election, as well as various news articles about the Respondent and a related organization.<sup>2</sup> It alleges that 51 percent of the Respondent’s 2016 spending was for independent expenditures and electioneering communications, and that its major purpose was therefore the election or defeat of federal candidates, triggering political-committee status.<sup>3</sup> 45Committee counters that it is not a political committee, but is instead an issue-advocacy and lobbying organization that, like many others, engages in occasional independent expenditures, political contributions, and electioneering communications.<sup>4</sup>

The Commission’s Office of the General Counsel (“OGC”) recommended finding reason to believe that 45Committee failed to organize, register, and report as a political committee, and it further recommended that the Commission launch an investigation.<sup>5</sup> Yet on multiple occasions over the course of two years, the Commission failed to adopt OGC’s recommendation.<sup>6</sup> Motions

<sup>1</sup> Complaint at 1–2 (Aug. 23, 2018), MUR 7486 (45Committee, Inc.).

<sup>2</sup> *Id.* at 3–6.

<sup>3</sup> *Id.* at 4–7.

<sup>4</sup> Response at 1–5 (Oct. 10, 2018), MUR 7486 (45Committee, Inc.).

<sup>5</sup> First General Counsel’s Report at 13–15 (Aug. 21, 2019), MUR 7486 (45Committee, Inc.).

<sup>6</sup> *See* Certification (June 23, 2020), MUR 7486 (45Committee, Inc.); Certification (Dec. 2, 2021), MUR 7486 (45Committee, Inc.); Certification (Jan. 11, 2022), MUR 7486 (45Committee, Inc.); Certification (Aug. 29, 2022), MUR 7486 (45Committee, Inc.).

to dismiss the allegations also failed, and after an egregious, multi-year delay, the Commission finally agreed to close the file on the matter.<sup>7</sup>

We voted against finding reason to believe in this matter both because of the legal infirmities with the Complaint’s theory and, at the later stages of consideration, because of the fruitlessness of pursuing enforcement. Our votes against proceeding were therefore based both on the merits and on the exercise of prosecutorial discretion. Pursuant to our legal obligations, we provide this statement to explain the reasons for our votes.<sup>8</sup>

## I. FACTUAL BACKGROUND

The facts and allegations in this matter are relatively straightforward and set out in the First General Counsel’s Report, so we do not repeat them.<sup>9</sup> Suffice it to say that the crux of the allegations go to 45Committee’s spending, the relevant timeframe in which to consider that spending, and how that spending impacts 45Committee’s major purpose. This is best summarized in the chart provided by OGC:<sup>10</sup>

	<b>Calendar Year 2016</b>	<b>Fiscal Year 2016-2017 (Apr. 1, 2016 – Mar. 31, 2017)</b>	<b>Lifetime</b>
<b>IEs</b>	\$21,339,015	\$21,650,515	\$23,026,077
<b>ECs</b>	\$671,320	\$671,320	\$838,989
<b>Overall Expenses</b>	\$42,564,823 <sup>21</sup>	\$45,556,334	\$59,854,457
<b>IEs/Overall</b>	50.1%	47.5%	38.5%
<b>(IEs + ECs) /Overall</b>	51.7%	49%	39.9%

These distinct methods for calculating the proportion of spending on independent expenditures and electioneering communications are critical to a proper legal analysis of the Complaint.

## II. LAW

Under the Act, a “political committee” is broadly defined as “any committee, club, association, or other group of persons” that receives contributions or makes expenditures in excess of \$1,000 during a calendar year.<sup>11</sup> The Supreme Court narrowed the scope of that term, however,

<sup>7</sup> *Id.*

<sup>8</sup> *See Dem. Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) (establishing requirement that “[t]he Commission or the individual Commissioners” must provide a statement of reasons why the agency “rejected or failed to follow the General Counsel’s recommendation”).

It bears remarking upon that this Statement of Reasons is being published at such a late date because of certain colleagues who, for several years, blocked the Commission from informing the Complainant, the Respondent, and the public of the Commission’s action. This has impeded—but should not defeat—meaningful judicial review of the Commissioners’ reasoning. *See Common Cause v. FEC*, 842 F.2d 436, 453 (D.C. Cir. 1988).

<sup>9</sup> First General Counsel’s Report at 2–7 (Aug. 21, 2019), MUR 7486 (45Committee, Inc.).

<sup>10</sup> *Id.* at 7.

<sup>11</sup> 52 U.S.C. § 30101(4)(A); *see also* 11 C.F.R. § 100.5.

in *Buckley v. Valeo*, so as to avoid overbreadth concerns that would proceed from regulating “groups engaged purely in issue discussion” as federal committees based solely on their “amount of annual ‘contributions’ and expenditures.”<sup>12</sup> *Buckley* held that the term “political committee” “need only encompass organizations that are under the control of a candidate or the *major purpose* of which is the nomination or election of a candidate.”<sup>13</sup> Following *Buckley*, an organization that is not controlled by a federal candidate must register and file reports as a political committee only if it both (1) receives contributions or makes expenditures exceeding the \$1,000 threshold, and (2) has the “major purpose” of influencing the nomination or election of federal candidates.

The Commission’s “major purpose test” uses a fact-specific, “case-by-case analysis” that considers the organization’s “overall conduct,” including its public statements, fundraising appeals, organizational records, government filings, and the proportion of its spending on “Federal campaign activity (*i.e.*, the nomination or election of a federal candidate)” relative to its spending for non-campaign activities.<sup>14</sup> Expenditures for “express advocacy” communications, along with any contributions made to federal committees, are the principal types of campaign spending relevant to the Commission’s “major purpose” inquiry.<sup>15</sup> Electioneering communications are “presumptively,” but not necessarily, included as kinds of campaign spending, but the Commission has not provided sufficient guidance on when that presumption no longer applies.<sup>16</sup> In determining whether an organization’s major purpose is the election or defeat of federal candidates, a critical question for the Commission is whether it allocates the majority of its spending toward federal campaign activity.<sup>17</sup>

An organization that qualifies as a political committee under the two-part analysis must comply with the extensive organizational, recordkeeping, and reporting requirements set forth in

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<sup>12</sup> 424 U.S. 1, 79 (1076 (per curiam)).

<sup>13</sup> *Id.* (emphasis added).

<sup>14</sup> Supplemental E&J at 5597, 5605. *See also* Factual & Legal Analysis at 9 (July 31, 2019), MUR 7465 (Freedom Vote, Inc.) (“[T]he Commission’s major purpose analysis has always focused on the proportion of its spending related to ‘Federal campaign activity’ (*i.e.*, the nomination or election of a Federal candidate) . . . rather than its amount.”).

<sup>15</sup> *See* Supplemental E&J at 5605. *See also* Concurring Statement of Commissioner Caroline C. Hunter at 2 (July 2, 2020), MUR 7465 (Freedom Vote, Inc.) (observing that “independent expenditures (by definition express advocacy communications) and contributions to SuperPACs (*i.e.*, independent expenditure-only committees)” are “squarely within the bright-line category of ‘campaign-related’ spending the Supreme Court described in *Buckley*” and therefore most “indicative of having the major purpose of nominating or electing federal candidates”); Statement of Reasons of Chairman Goodman and Commissioners Hunter and Petersen at 17 (Jan. 8, 2014), MUR 6396 (Crossroads Grassroots Political Strategies) (“[W]ithout any judicial holding to the contrary, the Commission should not consider more than express advocacy communications when examining a group’s spending as part of its major purpose analysis.”).

<sup>16</sup> *See Citizens for Responsibility & Ethics in Wash. v. FEC*, 299 F. Supp. 3d 83, 93 (D.D.C. 2018) (determining that the Commission “must presumptively treat spending on electioneering ads as indicating a purpose of nominating or electing a candidate”).

<sup>17</sup> *Cf.* Factual & Legal Analysis at 14–15 (June 6, 2017), MUR 6538R (Americans for Job Security) (concluding that an organization allocating the majority of its spending toward federal campaign activity was sufficient to determine its major purpose).

the Act and Commission regulations.<sup>18</sup> Among its legal obligations, a political committee must register with the Commission within 10 days, appoint a treasurer to maintain detailed records of all its transactions, file ongoing disclosure reports until its formal termination, and include disclaimer statements on its political advertising.<sup>19</sup>

### III. LEGAL ANALYSIS

#### a. Evidence of Major Purpose Was Insufficient

The Act specifies that the Commission may not undertake any investigation unless the Commission “determines, by an affirmative vote of four of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act.”<sup>20</sup> The reason-to-believe standard is “higher than the Federal Rules of Civil Procedure standard regarding the sufficiency of a complaint, which allows discovery on virtually every complaint that identifies any potential legal or equitable claim.”<sup>21</sup> Rather, the Commission will find reason to believe “only if a complaint sets forth sufficient separate facts, which, if proven true, would constitute a violation of the [the Act].”<sup>22</sup> As a result, before finding reason to believe, the Commission must scrutinize both the law and the credibility of the facts alleged.<sup>23</sup>

Foremost, we rejected OGC’s recommendations in this matter because, despite meeting the \$1,000 threshold, the evidence of 45Committee having the major purpose of influencing federal elections was insufficient. Before turning to OGC’s erroneous analysis of 45Committee’s spending, it behooves us to first consider the other, qualitative factors that the Commission has historically considered when analyzing an organization’s major purpose.

The record before the Commission contains little—beyond election-related spending—that would indicate that 45Committee’s major purpose is the election or defeat of federal candidates. On the one hand, 45Committee’s public statements, organizational documents, and federal tax status all suggest that it is primarily an issue-advocacy organization, albeit one that sometimes engages in federal election advocacy.<sup>24</sup> On the other hand, the only evidence to the contrary in the Complaint, which OGC accepts, comes from thinly sourced news articles, often using anonymous

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<sup>18</sup> See 52 U.S.C. §§ 30102-30104; 11 C.F.R. §§ 102.1-102.17.

<sup>19</sup> See 52 U.S.C. §§ 30102-30104; 11 C.F.R. §§ 102.1-102.17.

<sup>20</sup> 52 U.S.C. § 30109(a)(2).

<sup>21</sup> Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn at 4 n.12 (July 8, 2009), MURs 5977 and 6005 (American Leadership Project).

<sup>22</sup> Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas at 1 (Dec. 21, 2000), MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, Inc.).

<sup>23</sup> Statement of Reasons of Vice Chair Hunter and Commissioners McGahn and Petersen at 5 (June 14, 2011), MUR 6296 (Kenneth R. Buck).

<sup>24</sup> See Response at 1–5 (Oct. 10, 2018), MUR 7486 (45Committee, Inc.). See also Statement of Reasons of Vice Chair Hunter and Commissioner Goodman at 21–24 (Dec. 20, 2017), MUR 6872 (New Models) (analyzing similar facts in assessing an organization’s major purpose).

statements.<sup>25</sup> Weighing these, we concluded that the Complaint’s evidence was largely unreliable for similar reasons that past colleagues have,<sup>26</sup> and as we have elsewhere articulated when considering news accounts at the reason-to-believe stage.<sup>27</sup> Moreover, whatever evidentiary value that these articles and statements do hold is strongly rebutted by the Respondent. Consequently, contra OGC, we concluded that these non-spending factors militated against finding that 45Committee’s major purpose was to influence federal elections.

The remaining factor to analyze, then, is 45Committee’s political spending, and as past Commissioners have similarly concluded, we found the Complaint’s and OGC’s focus on a single election year of spending—not even an entire two-year election cycle—to create a skewed and unrepresentative picture of the Respondent’s election activity and major purpose. Indeed, past Commissioners have rejected this very approach by OGC, and we adopt their same reasoning in this matter here: “OGC’s myopic focus on one year of spending ... ignores an organization’s history and other activities.”<sup>28</sup> OGC’s statistical cherry-picking is even more egregious in this case than it was in MUR 6872 (New Models) because it not only overlooks 45Committee’s spending over the entire election cycle, but further ignores the fact that analyzing the Respondent under a fiscal-year view puts its spending on federal campaign activity under 50 percent—low enough, we believe, to indicate that its major purpose is not the election or defeat of federal candidates.<sup>29</sup> It is also noteworthy to us that this limited view at a single year of spending is inconsistent with how OGC and the Commission have analyzed past cases raising similar issues.<sup>30</sup>

The error in OGC’s narrow, calendar-year analysis is plain: political spending in a single election year is unlikely to represent an organization’s overall spending habits because of the ebbs and flows of political activity around biennial elections. As is true for candidate committees and nonconnected committees, political spending and campaign activity by non-committee organizations like 45Committee rises or falls depending on its proximity to election time. Spending in October of an election year will not represent a typical level of monthly political spending, nor will January after an election year. To gain a representative view of an organization’s overall

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<sup>25</sup> See First General Counsel’s Report at 13–15 (Aug. 21, 2019), MUR 7486 (45Committee, Inc.).

<sup>26</sup> See, e.g., Statement of Reasons of Chairman Petersen and Commissioners Hunter and Goodman at 8 (June 2, 2016), MUR 6661 (Robert E. Murray, *et al.*); Statement of Reasons of Vice Chair McGahn and Commissioner Hunter at 11 n.33 (July 25, 2013), MUR 6540 (Rick Santorum for President, *et al.*) (“[I]f anonymous complaints are prohibited by the Act, it is illogical to permit the underlying basis for a complaint to be an anonymous source in a newspaper article.”).

<sup>27</sup> See Statement of Reasons of Vice Chair Dickerson and Commissioners Cooksey and Trainor at 7 (Aug. 3, 2021), MUR 7354 (Friends of Chris McDaniel, *et al.*) (criticizing the use of “cherry-pick[ed] quotations, news reports, and hearsay” to support a Complaint’s theory).

<sup>28</sup> Statement of Reasons of Vice Chair Hunter and Commissioner Goodman at 21 n.96 (Dec. 20, 2017), MUR 6872 (New Models).

<sup>29</sup> *Id.* at 7–31. We fully adopt the legal arguments made by our predecessors in MUR 6872 (New Models), which involved similar issues. Rather than repeat their careful analysis, we incorporate their reasoning into our statement here by reference.

<sup>30</sup> *Id.* at 25 (summarizing OGC’s inconsistent methodology in past cases).

campaign activities, therefore, it is necessary to examine its spending over at least one full election cycle, and preferably several election cycles if possible.

As the old economics saying goes, if you torture the data long enough, it will confess to anything.<sup>31</sup> Likewise, because the Complaint and OGC narrow the relevant time period of political spending to examine to only a single election year, they are able to calculate a bare majority of political spending by the Respondent to justify their conclusions. But for all the reasons just describe, we reject that view as biased, and instead favor looking at 45Committee's broader lifetime spending. Because that more holistic view shows that the Respondent's campaign spending was below 40 percent of its overall spending, we concluded that it did not indicate a major purpose of influencing federal elections, and consequently disagreed with OGC's reasoning and recommendations on their merits.<sup>32</sup>

### **b. The Statute of Limitations Warranted the Exercise of Prosecutorial Discretion**

As evidenced by the relevant vote certifications, this matter was subject to Commission votes at the reason-to-believe stage over a period of more than two years.<sup>33</sup> Indeed, a majority of the Commissioners currently serving were not in active service at the first occasion that the Commission voted on OGC's recommendations in this matter in 2020. But as far as it relates to subsequent votes on this matter in 2021 and 2022, there were additional reasons that we voted against OGC's original recommendations—which dated back to 2019. Namely, even if four Commissioners agreed that there were reason to believe a violation had occurred, the passage of time and the lapsing of the statute of limitations had eliminated the Commission's ability to successfully pursue any successful enforcement.

When the Commission voted in December 2021, the Commission still stood at the beginning stages of any enforcement action.<sup>34</sup> By then, all of the relevant conduct was outside of

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<sup>31</sup> The saying is generally attributed to Nobel Prize-winning economist Ronald Coase, although the exact phrasing is disputed.

<sup>32</sup> See Statement of Reasons of Vice Chair Dickerson and Commissioner Trainor at 3–4 (May 20, 2021), MUR 7181 (Independent Women's Voice) (“[T]he simplest, cleanest, and fairest standard for determining whether an organization has the major purpose of nominating and electing federal candidates is to analyze its total spending on federal campaigns.”).

<sup>33</sup> See Certification (June 23, 2020), MUR 7486 (45Committee, Inc.); Certification (Dec. 2, 2021), MUR 7486 (45Committee, Inc.); Certification (Jan. 11, 2022), MUR 7486 (45Committee, Inc.); Certification (Aug. 29, 2022), MUR 7486 (45Committee, Inc.). The Commission lacked a quorum from July 2020 through December 2021, and during that time was statutorily precluded from acting further on the matter.

<sup>34</sup> Proceeding with enforcement in any matter requires many stages and significant agency resources. After finding reason to believe a violation has occurred, the Commission must undertake additional investigatory and deliberative steps before it can bring an enforcement action in federal court in a matter. If any attempt to conciliate with a respondent fails, OGC would then need to draft probable-cause briefs recommending that the Commission pursue enforcement. A respondent would be given fifteen days to respond to those briefs, as well as the right to request a probable-cause hearing. Following any hearing, the Commission would need to deliberate again over whether to find probable cause to believe the respondent violated the law. If the Commission found probable cause, under the Federal Election Campaign Act, it must then attempt to conciliate with the respondent again for no less than thirty

28 U.S.C. § 2462’s five-year statute of limitations or would be imminently.<sup>35</sup> This eliminated any basis for the Commission to pursue a penalty against the Respondent. Moreover, as we have described in other matters, there is no jurisdictional basis for the Commission to have pursued a remedy based on the Respondent’s alleged ongoing reporting obligations; mandating retrospective reporting and disclosure is also a penalty subject to 28 U.S.C. § 2462’s limitations period, and even if mandatory disclosure were not a penalty, any reporting requirement would still be barred under the concurrent-remedies doctrine.<sup>36</sup> In this regard, the matter bore strong resemblances to MUR 7465 (Freedom Vote, Inc.), and for the same reasons as we articulated there, this matter warranted dismissal as a matter of prosecutorial discretion and pursuant to the statute of limitations.<sup>37</sup>

Opening a new investigation in December 2021 over conduct that concluded in 2016 would have no chance of legal success and thus be a waste of agency resources. As the Commission prioritizes its limited enforcement budget and staff, it is clear that the Commission’s efforts are better spent on more timely matters in which it can conclude enforcement within the statute of limitations. For those prudential reasons—separate from, and in addition to, the merits issues discussed above—we rejected OGC’s recommendations to find reason to believe a violation occurred and to open an investigation.<sup>38</sup>

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“Justice delayed is justice denied” is more than just a cliché. Certain of our colleagues have indefensibly blocked this matter from being made public for years after the Commission first declined to proceed with enforcement. It has been a scandalous violation of 45Committee’s due process rights, and we hope that this kind of abuse of Commission procedures to harm respondents will never again be repeated.

For all the foregoing reasons, we voted against finding reason to believe the Respondent violated 52 U.S.C. § 30102, 30103, and 30104, and voted to close the file.<sup>39</sup>

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days. *See* 52 U.S.C. § 30109(a)(6). Only after that effort would the Commission consider whether to file a civil enforcement suit.


<sup>35</sup> *See* First General Counsel’s Report at 1 (Aug. 21, 2019), MUR 7486 (45Committee, Inc.) (noting the statute of limitations).

<sup>36</sup> *See* Supplemental Statement of Reasons of Commissioner Sean J. Cooksey (April 29, 2021), MURs 6917 & 6929 (Scott Walker, *et al.*) and MURs 6955 & 6983 (John R. Kasich, *et al.*).

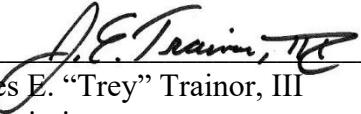
<sup>37</sup> Statement of Reasons of Chairman Dickerson and Commissioners Cooksey and Trainor (Mar. 7, 2022), MUR 7465 (Freedom Vote, Inc.).

<sup>38</sup> *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“[A]n agency’s decision not to prosecute or enforce ... is a decision generally committed to an agency’s absolute discretion ... [and] often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, ...”).

<sup>39</sup> *See* Certification (June 23, 2020), MUR 7486 (45Committee, Inc.); Certification (Dec. 2, 2021), MUR 7486 (45Committee, Inc.); Certification (Jan. 11, 2022), MUR 7486 (45Committee, Inc.); Certification (Aug. 29, 2022), MUR 7486 (45Committee, Inc.).

  
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Sean J. Cooksey  
Commissioner

August 30, 2022  
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Date

  
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James E. "Trey" Trainor, III  
Commissioner

August 30, 2022  
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